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United States Court of Appeals

12-2297

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12-2297pr

To be argued by:
D. B. KARRON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-2297

DANIEL B. KARRON,

Petitioner - Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PETITIONER - APPELLANT

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BRIEF FOR PETITIONER-APPELLANT

Preliminary Statement

This honorable Court's task in this Appeal is to issue a Certificate of Appealability because the district court erred in its denial of the Petitioner's 2255 habeas corpus review.

A "Reasonable Jurist" would not have found as the District Court's found; that "the motion and the files and records of the case conclusively show that the [Petitioner] is entitled to no relief."[1] [2] It was this very same Judge, who at sentencing, who observed that the **pivotal** forensic exhibit was not suitable for a criminal trial. [3] [4] [5] [6] [7] This same Judge has decided to forget his own critical

[1] 28 U.S.C. § 2255

[2] Armienti v. United States, 234 F.3d 820, 822-23 (2d Cir. 2000)

[3] A-259, Sentencing Tr. at 5 Lines 3-6. COURT "It seems to me this [GX114] is just a rough calculation and not something that a **Court could rely on in a criminal case**" [N.B. but it was. This very same exhibit was recalled by the Jury in its deliberations at KA-1699]

[4] A-290, Sentencing Tr. at 35 Line 20 ("MR. RUBINSTEIN: I submit to your Honor, that nobody from that chart[GX114] or from the [GX]110 [GX110] backup could say how they ever arrived at this number.") *cf* GX114 at A-233 and GX110 at KA-245 and at KA-282ff

[5] A-261, Sentencing Tr. at 6 Line 3 ("THE COURT: […] She [Expert Witness and Government Auditor Riley] has no tabulation putting [Exhibit] 114 into context with her […] [Government] Exhibit 110. ") *cf* GX114 at A-233 and GX110 at KA-245 and at KA-282ff

[6] A-262, Sentencing Tr. at 6 Line 18 ("It's a table saying salary. I don't care how she got the number […] Its […] Salary") [NB: We will show that she had to include the rent to get to the numbers she shows. The District Court should have cared; This was the critical error. The Court should have declared a mistrial because of faulty or

reservations about the Government's "Junk Auditing" and "Junk Accounting"[8] and to aver that "the Petitioner makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue[9].

This is not what a "Reasonable Jurist" would find. Had the facts pointed out *below*, been brought to the jury at the criminal trial, there would be no misappropriated rent. This is because the Government auditor correctly reclassified it as payroll to Karron. Had a "Reasonable Jurist" been shown that Karron intentionally and willfully contributed almost all of her *bona fide* salary to pay for required co-funding and otherwise disallowed or disallowable costs, no misappropriation of Government funds could have occurred.[10] For argument pointed below, the constitutional rights of the petitioner were violated and the petitioner is entitled to relief.

A plain reading of the law and rules cited in the co-operative agreement reveals another fundamental conflict of law in this case. The granting program, the NIST[11] ATP[12] did not have authority[13] or a waiver to derogate[14] superior OMB[15] and DoC[16] contemporaneous standards, rules and statutes. Because of this, the

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unreliable pivotal evidence. Had the jury known that the rent was reclassified as Karron's payroll and then again as a criminally misappropriated rent item, they probably would not have convicted Karron]

[7] A-272, Sentencing Tr. at 7 ("COURT: It's denominated salary.")

[8] We use the term 'Junk Audit' and 'Junk Accounting' in the spirit of "Junk Science" and the Daubert Standard set by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) in as much as the "plaintiffs' evidence appeared to be generated in preparation for litigation." Furthermore, the "plaintiffs' proffered evidence had not yet been accepted as a reliable technique by scientists who had had an opportunity to scrutinize and verify the methods used by those scientists.".

[9] See 28 U.S.C. § 2253.

[10] Our argument is easily demonstrated to any reasonable jurist as true with just a little arithmetic, is that the Governments proffered GX114 exhibit audits do not add up and appear partially made up: they include malicious fabrications. We do not have to delve into the methods used by an expert witness under Federal R. Evidence 702 and Federal R. Evidence 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."). If cursory examination shows the sums don't add up except by inclusion of the Rent as salary, and the rent is repeated twice in the grand column sum, we have met the burden of evidence. Karron went to prison and is paying restitution on this illegal misappropriated "rent" when it was otherwise reclassified as *bona fide* Payroll.

[11] National Institutes of Standards and Technology, a component of the Department of Commerce, formerly the National Bureau of Standards.

[12] Advanced Technology Program The ATP enabling legislation was abrogated by Congress in 2007

[13] By OMB Waiver, as formally required by NIST or OMB

[14] Definition of DEROGATION: The partial repeal or abolishing of a law, as by a subsequent act, which limits its scope or impairs its utility and force. The partial abrogation of a law; to derogate from a law is to enact something which is contrary to it; to abrogate a law is' to abolish it entirely. Distinguished from abrogation, which means the entire repeal and annulment of a law. Black's Law Dictionary Free Online 2nd)

[15] Office of Management and Budget (OMB) at Executive Branch/White House

[16] Department of Commerce (DoC)

project was not out of budget. The 10% budget variation rule was incorrectly derogated from a change base of the entire approved budget to the annual budget.

Standard of Review

Procedure and "Reasonable Jurists Standard"

Petitioner may appeal the District Court's denial of her § 2255 motion[17], by first obtaining a "Certificate of Appealability"(CoA) [18]. A CoA[19] issues when the applicant makes a substantial showing of the denial of a Constitutional Right:

A "substantial showing of the denial of a constitutional right" requires a demonstration "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were" adequate to deserve encouragement to proceed further." The Supreme Court in Slack[20] [21] wrote:

> [R]easonable jurists could conclude that the District Court's abuse of the writ holding was wrong, for we have determined that a habeas petition filed after an initial petition was dismissed under Rose v. Lundy [22]without an adjudication on the merits [23]

This brief in support of the Petitioner's Application of Appealability argues that the District Court Opinion denial of the writ was made without "an

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[17] 28 U.S.C. § 2253 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings. (c)
(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). (http://www.law.cornell.edu/uscode/text/28/2253)
[18] Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c).
[19] 28 U.S.C. § 2253(c)(2)
[20] Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, *below*).
[21] Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)
[22] Rose v. Lundy - 455 U.S. 509 (1982)
[23] Slack v. McDaniel, 529 U.S. 473, 484 (2000)

adjudication on the merits"[24]. The Court ignored the meritorious central claim (C) of Actual Innocence because the Governments forensic auditing was 'Junk'.[25] [26] Instead, the Court focused on sub-claims and arguments that don't stand alone, but must be viewed in a light of the overarching principle that the Governments numbers are junk and Karron was spending her own *bona fide* funds in addition to Government funds.

The District Court Opinion

The District Court opinion being appealed "Discussion" section contains 3 component sub-sections. We work backward through the Courts arguments based on the foundational premise of Actual Innocence(AI); the overarching principle. The arguments of Brady Violations and Ineffective Assistance of Counsel (IAC) are then addressed within that rubric.

Outline of the District Courts Opinions

A (Ineffective Assistance of Counsel) at 6 (KA-12)
- 1. Ineffective Assistance of Counsel Standard at 7 (KA-13)
  - a. Deficient Performance at 7 (KA-13))
  - b. Prejudice to Petitioner at 7 (KA-13)
- 2. Petitioner's Ineffective Assistance of Counsel Arguments at 8 (KA-14)
  - a. Counsel Failed to Utilize Forensic Accounting Analysis at 8 (KA- 14)
  - b. Counsel Failed to Impeach The Government's "Key Witness" at 10 (KA-16)
  - c. Counsel's Preparation for Trial at 11 (KA-17)

B (Petitioner's Brady Claims) at 12 (KA-18)
- 1. Procedural Default at 12 (KA-18)
- 2. Petitioner's Claim of Exculpatory Documents at 13 (KA-19)
- 3. Petitioner's Claim of OIG Agent Intimidation at 14 (KA-20)

C (Actual Innocence Claim) at 14 (KA-20)

We will review and rebut the District Court Opinions in reverse order, starting with the last section (C), Actual Innocence.

Actual Innocence (C)

Argument

[24] *ibid*
[25] Margery I. Miller, A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts, 72 Fordham L. Rev. 2593 (2004), http://ir.lawnet.fordham.edu/flr/vol72/iss6/9
[26] William P. Welty (2003) ADJUDICATION ON THE MERITS. JOURNAL OF CONSITUTIONAL LAW May 2003, at 900

The Petitioner bypasses the procedural bar of failing to raise claims on direct appeal if she demonstrates "actual innocence".[27] "To establish actual innocence, Petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him."[28] [internal quotations omitted]. For an actual innocence claim to prevail, a petitioner must present "new reliable evidence . . . that was not presented at trial."[29] The District Court Opinion wrongly states "Petitioner does not point to any new evidence which would demonstrate actual innocence."[30]

The three major new reliable points of evidence are:

1. Point 1: The project was within allowed 10% budget flexibility tolerance that did not require prior approval.
2. Point 2: The "rent" was reclassified as payroll and not misappropriated
3. Point 3: Karron *bona fide* contribution used to pay unallocable costs and not misappropriated.

Point 1: The project was within allowed 10% budget flexibility tolerance that did not require prior approval

The Prosecution, Defense, and the Court incorrectly believed that the allowed project budget change was 10% based on the last approved total annual budget [31] as Lide[32] [33] [34] [35] and Snowden testified[36], and both the Defense and

[27] Bousley, 523 U.S. at 623.
[28] Schlup v. Delo, 513 U.S. 298, 327-328 (1995)
[29] Ibid. at 324
[30] KA-21
[31] KA-629, GX4, Slide 12, Recipient Responsibilities, Prior Approvals, Notify Grants Specialist: Budget Line Item Change >10% of total annual approved for each Recipient in each project year. (cf KA-3430, OIG First-time Grantee Workshop, which only specifies —"10% limitation on transfers among direct cost categories")
32 KA-1889, Trial Transcript at 60 Line 10 Lide - Direct,("A. Yes. There are certain circumstances. 10 percent of the annual amount that they are going to spend can be moved within existing categories.")
[33] KA-1917, Trial Transcript at 87 Line 1,(A. I helped develop some of the rules and regulations, and I have followed them in all of the projects that I manage. Q. What are a grantee's obligation under that program with respect to their budget? A. Their obligation is that they adhere to the budget and all of the rules and regulations in these documents. Q. Are there circumstances under which they can deviate from the budget? A. Yes, there are. For any given budget year, for the amount of money allocated to that year, they can move up to 10 percent from one category to another as long as those categories exist in the budget. Q. What if they want to move money that exceeds the 10 percent annual budget amount? A. They must ask for permission and get written prior approval before the new budget is authorized.)
[34] KA-1924, Trial Transcript at 94 Line 17 (A. This paragraph is repeating what we said earlier, that we need prior written approval for any change in the budget over 10 percent of the annual amount.)
[35] KA-2020, Trial Transcript at 190 Line 23ff (Q. Now, in the budget you're allowed to move any item -- increase it by 10 percent, is that correct? A. If you decrease something else by the equivalent amount, and if it's within 10

Prosecution believed. In this case GX2[37] specifies a change of plus and minus $83,650[38] allowed without approval. Snowden testified that "Program Specific" rules overrode regulations that are more general.[39] This is not true without a deviation waiver from the OMB. [40] [41] [42] [43]

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percent of that year's budget. So cumulatively over year one, only $80,000 could have been moved without prior approval. Q. Can you -- in other words, they doesn't utilize the 10 percent, the ten million -- the two million rather? A. No. It's on a year-to-year basis. Q. And is that specified in some of this material? A. Yes. I believe it's actually in the special award condition, which I can try to find, but that's articulated very clearly in -- at all these meetings and kickoffs and proposers conferences, et cetera. It could also be in Exhibit 4 in those slides A. If you decrease something else by the equivalent amount,)

[36] KA-2266, Trial Transcript at 436ff Line 14: (Snowden - redirect [RUBINSTEIN] Q. And you were also asked I believe about revising budgets, specifically the ten percent rule which is on that slide. Is that right? A. Yes. Q. And you testified about what that 10 percent rule means, right? A. Yes. Q. And is that 10 percent of the total award amount or 10 percent of the annual budget that you're allowing? A. It's 10 percent of the annual budget. Q. So, if you are allowed $800,000 in the first year of your grant, how much can you move around in the first year of your grant without getting prior approval? A. $79,999.99, under $80,000.)

[37] KA-590, GX2: GENERAL TERMS AND CONDITIONS ADVANCED TECHNOLOGY PROGRAM August 2001 (9. PRIOR APPROVAL REQUIREMENTS: The prior approval requirements in 15 C.F.R. 14.25, ¶(e) [N. B. KA-455] MAY NOT be waived automatically by the Recipient and require written approval from the Grants Officer. In addition to the requirements specified in 15 C.F.R. 14.25, Recipients shall obtain prior written approval from the NIST Grants Officer for the following changes: a. The transfer of funds among direct cost categories must be approved in advance by the Grants Officer if the transfer exceeds 10% of the approved total **annual** budget) [original emphasis]

[38] KA-637, GX14: TOTAL ESTIMATED COST and OBJECT CLASS CATEGORY H. Total Direct Cost. (Line. A thru G) of $836,500.

[39] KA-2129, Trial Transcript at 29ff8 Line 17 (Snowden – direct [KWOK] Q. "We talked a bit also about the regulations governing the ATP grants yesterday. A. Yes. Q.... Are there government-wide regulations that apply to the ATP grants that are not ATP grant specific? A. Yes. Q. And do these regulations apply to more than one government grant? 1 A. Yes. Q. Are there rules specific to the ATP grant that just cover the ATP grant? A. Yes, there is. Q. And which rules control if there is an ATP-specific rule versus a government-wide rule? A. Your ATP special work conditions and your general terms and conditions, they are specified within the award, so ... Q. So, if there is an ATP rule that applies to the ATP grant and a government-wide rule -- A. Your ATP rules supersede all other rules, because they're program-specific rules, so you have your ATP rules and then other rules, but ATP supersedes everything.") (also cited in KA-229, 11-cv-01874-RPP Document 29 at 25, footnote)

[40] KA-3339, IMPLEMENTATION OF FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1974. Waiver of administrative standards. OMB is responsible for most of the administrative standards that apply to assistance programs. Agencies should follow these standards. The circulars that establish these standards presently provide procedures for granting of waivers, If the standards appear unsuitable to a particular situation, requests for waivers should be sent to the OMB office […].

[41] KA-444, 15 C.F.R. Subtitle A (1–1–01 Edition) §14.1 Purpose. The Grants Officer shall incorporate this part by reference into financial assistance awards made to organizations to which it will be applied. The DoC shall not impose additional or inconsistent requirements, except as provided in §§ 14.4[see *below*], and 14.14 or unless specifically required by Federal statute or executive order.

[42] KA-448, 15 C.F.R. Subtitle A (1–1–01 Edition) § 14.4 Deviations. The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances. The Assistant Secretary may apply more restrictive requirements to a class of recipients when approved by OMB.

[43] KA-449, 15 C.F.R. Subtitle A (1–1–01 Edition) § 14.14 High risk special award conditions. If an applicant or recipient: has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this part, has not conformed to the terms and conditions of a previous award, or is not

Point 1.1: The Allowed Budget Change was $420K not $80K.

Governing rules15 C.F.R. § 24.30 [44], 15 C.F.R. § 14.25(f)[45], and co-operative agreement GX3[46], calls out[47] a percentage base on the entire currently approved budget. In this instance that is plus and minus $211,450 , for a total swing of $422,900. Further, 15 C.F.R. § 14.25(e)(4) [48] claims it is the superior statute and specifies it may not be overridden without approval from the OMB. No evidence of OMB approval for ATP Program Specific Rules has been offered or found. GX2[49] [50] claims it is superior authority and may not be overridden without approval from the Grants Officer.[51] NIST ATP program specific budgets change

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otherwise responsible, the Grants Officer may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

[44] KA-473, 15 C.F.R. (1–1–01 Edition) § 24.30 Changes. (c) Budget changes—(1) (ii) Nonconstruction projects. Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which **exceed or are expected to exceed ten percent of the current total approved budget** (*cf* KA-230, 11-cv-01874-RPP Document 29 at 26, footnote)

[45] KA-478, 15 C.F.R. (1–1–01 Edition) § 14.25 (f The recipient may not transfer funds among direct cost categories or programs, functions and activities for construction or nonconstruction awards in which the cumulative amount of such **transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Grants Officer**. This does not prohibit the recipient from requesting Grants Officer approval for revisions to the budget […])[emphasis added] (cf KA-230, 11-cv-01874-RPP Document 29 at 26 footnote)

[46] KA-611, GX3 OCTOBER 1998 DEPARTMENT OF COMMERCE, FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS, ..04 b. Unless the Recipient is subject to 15 C.F.R. § 24 […] cumulative transfers of funds of an amount above 10 percent of the total award must be approved by the Grants Officer in writing. **This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) total budget**.[emphasis added] (cf KA-230 11-cv-01874-RPP Document 29 at 26 footnote)

[47] KA-1916, Trial Transcript at 86 Line 10 (GX3 introduced into evidence). This discrepancy in percentage base was not noticed. The Lide and Snowden and the Prosecution Team continued to assume that Exhibit 3 referred to a project budget year base amount instead of it actually referred to a project budget lifetime change base. see *above*.

[48] KA-488, 15 C.F.R. (1–1–01 Edition) § 14.25 (d ("For nonconstruction awards, **no other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB**.")[emphasis added](cf KA-230, 11-cv-01874-RPP Document 29 at 26 footnote, cf KA-656, Joseph Levine, It's the Law article "Say What You Mean")

[49] KA-587, GX2: GENERAL TERMS AND CONDITIONS, ADVANCED TECHNOLOGY PROGRAM August 2001 ("9. PRIOR APPROVAL REQUIREMENTS The prior approval requirements in 15 C.F.R. 14.25, paragraph (e) MAY NOT be waived automatically by the Recipient and require written approval from the Grants Officer.")

[50] KA-455, 15 C.F.R. 14.25 Revision of budget and program plans. (e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, the Grants Officer may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122.

[51] KA-656, ("Thus, when we are faced with situations where we want to deviate from the basic cost principles, it is imperative that we carefully examine the language of proposed special award conditions to ensure that they are clear, justified and accomplish the desired objective.") (cf KA-639)

practices were not part of the ATP statute[52] and ATP rule[53]. The authority of these practices is unclear[54] . They were made part of ATP cooperative agreements by reference[55].

Point 1.2: ATP Special Award Conditions conflict with superior DoC and OMB Rules

As of 2001, ATP practices appear to have conflicted with superior "general" Department of Commerce and National Institute of Science and Technology Title 15 C.F.R. regulations and OMB circulars concerning the change base upon which to apply the 10% variation allowance. Snowden testified that "Program Specific" rules overrode regulations that are more general.[56] However, governing rules15 C.F.R.. § 24.30[57], 15 C.F.R.. § 14.25(f)[58], and GX3[59], calls out a percentage base on the entire approved budget. In this instance that is plus and minus $211,450, for a total swing of $422,900.

Point 1.3 Deviations from OMB and DoC standards require waver

15 C.F.R.. § 14.25(e)(4)[60] claims it is the superior statute and specifies it may not be overridden without approval from the OMB. *Institute for Technology*

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[52] KA-423, 15 U.S.C. § 278n (2001)
[53] KA-428, 15 C.F.R. § 295 (2001)
[54] KA-1890, Trial Tr. at 61 Line 1: (Lide – Direct A. "I helped prepare them, I used them, and they were given to me as project manager.") (*cf* KA-229, 11-cv-01874-RPP Document 29 at 25)
[55] A-633, through GX12 Cooperative Agreement Award
[56] KA-618ff, Trial Tr. at 298 Line 17 ("Snowden, direct Q. We talked a bit also about the regulations governing the ATP grants yesterday. A. Yes. Q. Just a few more questions about that. Are there government-wide regulations that apply to the ATP grants that are not ATP grant specific? A. Yes. […] Q. Are there rules specific to the ATP grant that just cover the ATP grant? A. Yes, there is Q. And which rules control if there is an ATP-specific rule versus a government-wide rule? A. Your ATP special work conditions and your general terms and conditions, they are specified within the award, so ... Q. So, if there is an ATP rule that applies to the ATP grant and a government-wide rule -- A. Your ATP rules supersede all other rules, because they're program-specific rules, so you have your ATP rules and then other rules, but ATP supersedes everything.")
[57] KA-1735, 15 C.F.R. (1–1–01 Edition) § 24.30 Changes. (c) Budget changes—(1) (ii) […]exceed or are expected to exceed ten percent of the current total approved budget[…][require approvals][emphasis added]
[58] KA-50, 15 C.F.R. (1–1–01 Edition) § 14.25 (f) The recipient may not transfer funds […] in which the cumulative amount of such **transfers exceeds or is expected to exceed 10 percent of the total budget […][emphasis added]**
[59] KA-185, GX3 OCTOBER 1998 DoC FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS, .. 04 b. [KA-189] Unless the Recipient is subject to 15 C.F.R. § 24 […] ("cumulative transfers of funds of an amount above **10 percent of the total award must be approved** […] This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) **total budget**."[Emphasis Added])
[60] KA-50, 15 C.F.R. (1–1–01 Edition) § 14.25 (d ([…] "("For non construction awards, **no other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB**.")[emphasis added, "no derogation clause"] (cf KA-3348, KA-230, 11-cv-01874-RPP Document 29 at 26 footnote)

Development v Brown[61] raises important issues with award language which deviates from the uniform standards set forth in superior OMB Circulars Rules and Statutes. In its decision overruling the DoC and reversing the District Court, the Circuit Court explains:

> We start with the premise that the terms of a grant agreement are binding on both the grantee and the grantor.[62] Although grant agreements have this contractual aspect, the Supreme Court has further explained that, "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.[63] [64]

The significance of this finding on this case on the Special Award Conditions and ATP Specific Rules is that, contrary to trial testimony and ATP Practice, superior OMB and DOC rules and Congressional intent may not be ignored, abrogated, or derogated without a waiver, in 2001.[65]

Point 1.4 ATP conflicts with OMB and DoC caused unstable rules and practice.

NIST was aware of these conflicts[66] as the verbiage for the 10% change base

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[61] KA639 Institute for Technology Development v. Brown, 63 F.3d 445 (C.A.5 (Miss.), 1995) ("the Office of the Inspector General conducted an audit of the grants and recommended that certain costs improperly spent under the grants be disallowed. EDA[Economic Development Agency] subsequently accepted this recommendation and disallowed a portion of the costs charged against the federal funds. Applicable regulations, however, provided that when claimed expenses were disallowed, a grantee, such as ITD[Institute for Technology Development], could substitute and claim reimbursement for other previously unclaimed "allowable" expenses it may also have incurred in the operation of the sponsored project. Pursuant to these regulations, ITD sought reimbursement for some of the depreciation expenses it had incurred, but had not initially claimed for reimbursement under the grants. [...]ITD attempted to raise this claim for depreciation as an allowable substitute cost before the district court. Here, ITD argues that because applicable regulations recognize depreciation as an allowable substitute cost, the district court erred in granting summary judgment in favor of EDA[…] After examining the Grant Agreements between EDA and ITD, the congressional intent underlying these grants, and the provisions of the Study, we hold that the district court erred in affirming the decision of the Assistant Secretary […]"under Circular A-122 depreciation is generally an allowable cost, but stated that her position was based only on the parties' intent, not on the "allowableness issue." […]depreciation was not intended to be charged to the grants. […]determinative factor in our decision not to accept depreciation as an allowable substitute cost is that there is no provision in the grants for depreciation to be charged as a direct cost.)

[62] United States v. Marion County Sch. Dist., 625 F.2d 607, 609 (5th Cir.1980), cert. denied, 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 298 (1981).

[63] Bennett v. Kentucky Dep't. of Educ., 470 U.S. 656, 669, 105 S.Ct. 1544, 1552, 84 L.Ed.2d 590 (1985).

[64] KA-639, Institute for Technology Development v. Brown, 63 F.3d 445 (C.A.5 (Miss.), 1995)

[65] KA-440, 15 C.F.R. Subtitle A (1–1–01 Edition) § 24.30 Changes. (b) Relation to cost principles. ("The applicable cost principles (see § 24.22[Allowable costs and Applicable cost principles.]) contain requirements for prior approval of certain types of costs. Except where **waived**, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.")

[66] KA-654 and KA-660 ("It's the Law" DoC law review newsletter)

kept changing as soon as the CASI project started in October 2001[67] with revision of 1998, and a new revision just released in October 2001[68] [69] [70] . The change base verbiage continued to narrow (derogate) until it was apparently expanded[71] The Republican-led Congress, as well as the second Bush administration, repeatedly recommended ATP termination. The program was suspended in 2005 with the White House working with the Administration and Congress to terminate this program. It was restarted then finally shut down in 2007[72], with the abrogation of the ATP enabling statute.[73] At no point in the ATP program history was an OMB waver issued for the ATP program derogation deviations.

Point 1.5 NIST ATP was flexible.

The ATP prided itself on its flexibility. The program flexibility was demonstrated in the program in fact granted Karron budget changes and reclassifications.

- Power and Utilities reclassified as direct[74]
- Statements by Director[75]
- Statements on Proposal Instructions[76]

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[67] KA-609 GX-3, DEPARTMENT OF COMMERCE FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS, October 1998 (".04 Budget Changes and Transfer of Funds Among Categories. b. […] cumulative transfers of funds of an amount above 10 percent of the total award must be approved by the Grants Officer in writing. This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) total budget." The total budget in this case is GX14 at KA-637, for $2,121,000)

[68] KA-3342 DEPARTMENT OF COMMERCE FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS October 2001 (".04 Budget Changes and Transfer of Funds Among Categories b. Transfers of funds by the recipient among direct cost categories are permitted for awards in which the Federal share of the project is $100,000 or less. For awards in which the Federal share of the project exceeds $100,000, transfers of funds must be approved in writing by the Grants Officer when the cumulative amount of such transfers exceed 10 percent of the current total Federal and non-Federal funds authorized by the Grants Officer. The 10 percent threshold applies to the total Federal and non-Federal funds authorized by the Grants Officer at the time of the transfer request. This is the accumulated amount of Federal funding obligated to date by the Grants Officer along with any non-Federal share. " This version of the Standard Terms and Conditions was never made part of this project's cooperative agreement.)

[69] KA-3366 DEPARTMENT OF COMMERCE FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS January, 2005.

[70] KA-3374DEPARTMENT OF COMMERCE FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS March, 2008

[71] KA-3413, First-time Grantee Workshop U.S. Department of Commerce (Sometime after 2005) ("Commerce Standard Terms and Conditions —10% limitation on transfers among direct cost categories")

[72] America COMPETES Act (H.R. 2272; Public Law Number 110-69)

[73] KA-4232, 15 U.S.C. §278n (2001) § 278n. Advanced Technology Program (a) Establishment; purpose; focus; guidance . cf 15 C.F.R. §295.1

[74] KA-3245, Sentencing 1 Transcript at 17 Line 15: COURT: There was some testimony on utilities. He got an approval.

[75] KA-265, ("We try not to be too bureaucratic. We are very supportive of the companies that win awards from us, and you actually have a management team that we assign")

It appears that additional direct evidence of these grants were suppressed and not brought to the trial. This flexibility was contradicted by the prosecution theory of strict adherence to narrow budget.

Conclusion: Project was within budget limits and there is no misappropriation

Derogation of budget flexibility rules was against program and Congressional intent.[77] Because ATP did not have an OMB or DOC waver for deviation of its program specific rules, the project budget change base was 10% of the entire budget, not the annual budget. In this case that is plus and minus $211,450 for a total swing of $422,900. The worst case estimate out of budget year 1 and 2 spending from GX112 and GX113 spending cited at trial of $268K + $196K = $464K .[78] Less 60K for rent as salary(see GX114 issues, *below*), this gives $404K; less than the maximal permissible budget swing of $423K ($434 - $404 = $30K). In years since 2001, the program's ultimately dropped the 10% annual change base language.[79] [80] This is within the statute of the Petitioner's conviction 18 U.S.C. 666(a)(1)(A) threshold $5,000. The Petitioners conviction could be reversed on this fact alone.

District Court Dismissal of "GX114 Issues"

The Court misconstrued that the Petitioners GX114 arguments "all revolve around purported, but unspecified, discrepancies she claims exist in Government Exhibit 114."[81] Those discrepancies are precisely specified in Point 2 and 3

Point 2: The rent was reclassified as *bona fide* Karron payroll

The Rent was not allowed.[82] It was never allowed.[83] The rent was

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[76] KA-578, GX1, ATP Proposal Preparation Kit ("Don't fear that by providing a multi-year budget beyond the first year, you will be locked into those details. ATP allows a certain amount of flexibility in moving funds from one line item to another as circumstances change") [Emphasis Added]

77 KA-425, 15 U.S.C. §278n (2001) (The ATP Enabling Statute […] support projects which are high risk and which have the potential for eventual substantial widespread commercial application.

78 KA-2661, Trial Transcript at 829 at 5, ("Riley – recross Q. How much, according to these red circles on Exhibit 114 and 115, how much does Dr. Karron, according to you, owe NIST ATP? A. According to the red circles? It would be 268,000 plus -- Q. Pardon? A. -- 196. Q. What? A. 268,000 plus 196,000 is how much CASI would owe back.")

[79] KA-3403, General Terms and Conditions Advanced Technology Program September 2007

[80] KA-3430, First-time Grantee Workshop U.S. Department of Commerce Office of Inspector General ("Commerce Standard Terms and Conditions —10% limitation on transfers among direct cost categories")

[81] KA-21 (Karron Reply Brief. at 27-30 cf KA-244)

[82] KA-520, GX1 Chapter 1, Section C.5 of the November 2000 ATP Proposal Preparation Kit ("5. What types of costs are unallowable?) Based on the assumption that it is an indirect or overhead cost, and is allocable to multiple

reclassified into salary[84]. GX114 includes rent checks (buried) in Karron's salary line.

GX114[85] was prepared by Riley using "canceled checks and American Express statements [as] the main source documents,"[86] As such, it ignored Karron OoP[87], checks, credit card, Accounts Payable, and cash payments made on behalf of the ATP project for such things as Travel and the SGI Computers. The District Court Judge described it best.[88] [89] [90] [91] [92] Simply put, there are just not enough checks to and from Karron to make up the "denominated salary"[93] without including the rent checks and using the CASI personnel fringe rate.[94] The District Court allowed the loans as repaid, and acknowledged it was classified Payroll, but missed completely that the rent was reclassified as Payroll in a rush to finish counsel's cross-examination[95] and a rush to finish sentencing.[96]

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projects and applications.

[83] It was never allowed as 'rent' *per se*. The re-class was done un-heralded by the prosecution. It is the strongest evidence of a Brady violation by the prosecution because there must be ATP supporting memos and e-mail on this decision to re-class.

[84] KA-72, Karron Br. at 33. "10. The Explanation for the Karron Salary Line is to include Rent Checks"

[85] KA-323,KA-233 GX114 and GX114 Table in Focus

[86] KA-2381, (Trial Transcript at 551 Line 1 Riley - direct "A. Yes, they are the pie charts that I created for the analysis of the expenditures. Q. And what documents did you look at to create these graphs and charts? A. Canceled checks and American Express statements were the main source documents used to create these. MR. KWOK: Government offers Government's Exhibits 114 and 115. MR. RUBINSTEIN: No objection, your Honor. THE COURT: 114 and 115 are admitted into evidence. (Government's Exhibits 114 and 115 received in evidence)")

[87] Out of Pocket: Program costs paid out of pocket by Karron

[88] KA-3233, Sentencing Tr. at 5 Lines 3-6. COURT "It seems to me this is just a rough calculation and not something that a Court could rely on in a criminal case. […] That's my assessment of that proof." [N.B. but it was. This was recalled by the Jury in its deliberations at Trial Tr. at 1370 *cf* KA-3205]

[89] KA-3263, Sentencing Tr. at 35 Line 20 ("MR. RUBINSTEIN: I submit to your Honor, that nobody from that chart[GX114] or from the [GX]110 [GX110] backup could say how they ever arrived at this number.") *cf* GX114 at KA-325 and KA-327 and GX110 at KA-331ff

[90] KA-3234, Sentencing Tr. at 6 Line 3 ("THE COURT: […] She has no tabulation putting [Exhibit] 114 into context with her […] Exhibit 110. ") *cf* GX114 at KA-325 and KA-327 and GX110 at KA-331ff

[91] KA-3234, Sentencing Tr. at 6 Line 18 ("It's a table saying salary. I don't care how she got the number […] Its […]Salary")

[92] KA-3235, Sentencing Tr. at 7 ("COURT: It's denominated salary.")

[93] KA-3235, Sentencing Tr. at 7 ("COURT: It's denominated salary.")

[94] KA-2635, Trial Tr. at 803 Line 19.(" Riley – cross RUBINSTEIN: Q. CASI spent $200,488 on his salary. How did you get that number? A. By including the withholdings portion of the fringe benefits as part of the salary of what he received. It includes the salary, it includes the difference between the loans he received and the loans he paid, and it includes the fringe benefits.")

[95] KA-2636, Trial Tr at 804 Lines 16 et seq ("MR. RUBINSTEIN: [Comment Addressed to THE COURT] I'm asking if that's on her schedule, her exhibit, the Government's Exhibit 114. THE COURT: Find out what you're dealing with and the exhibit and I will allow your question, but I'm not allowing that. And your time is up. So this is the last question. MR. RUBINSTEIN: Judge, I'd ask you to give me ten more minutes. THE COURT: All right, ten minutes, and that is all. MR. RUBINSTEIN: Thank you.")[The succeeding dialog is MR. RUBINSTEIN trying to find out where the extra denominated salary came from. We show it was from the "rent" and fringes on the rent.]

Point 2.1 Proof of reclassification of rent into *bona fides* personnel

There are only [97] 53 checks paid to Karron in the first project year from CASI. The GX110 schedule groups 15 checks totaling $129,850 as "loan" [98], 7 checks from Karron for $37,000 as loan repayments, 8 checks to Karron for $35,293.58 as 'net payroll', and 30 checks marked as "rent net" for $60K.[99] GX110 gives the first year period sum of checks to and from Karron as $188,143. GX114 calls out the first year Karron salary as $200,488 and $19,183 as fringes for a gross salary $219,671. The rent and 14% fringes[100] [101] [102] [103] on the checks marked **"rent" must be included as salary in order to sum up to the denominated salary in GX114**.[104] The loan checks were counted as *bona fide* salary advanced from the grant working capital advance.[105] The checks to Karron with memo annotations of rent in GX110 schedule were similarly corrected and correctly re-classified into *bona fide* salary in the GX114 analysis. *Q.E.D.* [106]

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[96] KA-3284, Sentencing Tr at 56 ("THE COURT: This doesn't show that the amounts taken for rent were part of the salary computation. MR. RUBINSTEIN: What I'm saying, Judge, I was trying to add up the numbers to get to her number. And the only way I could do that was by throwing in the 60,000[rent] for salary so that if, in fact, his salary is accurate, which he has -- THE COURT: I've got to get this sentence completed. We can take a five-minute recess, if that's what you want. Take a five-minute recess then, but I don't think it's going to make much difference.") (The judge was completely wrong on this point.)

[97] KA-331 to KA-333, GX110

[98] KA-331, GX110

[99] KA-332, GX110

[100] KA-2042, Trial Transcript at 212 line 8 *et seq* ("A. […] fringe benefits is a percentage of salaries. Q. So, is that anywhere in any literature that fringe benefits is a percent of salary? A. Well, it's -- yeah. I even it comes in the budget narrative. If you look at the salaries and then the next block says what are the fringe benefits and it says, you know, 34 percent or whatever. Q. Can you pick your own percentage? A. As long as it's -- well, can you pick your own percentage? It clearly goes with the written document that you have that is industry practice. We don't ask for detailed explanation or breakdown if it's under 35 percent.")

[101] KA-2102, Trial Transcript at 272 Line 10 *et seq*

[102] KA-3232, Sentencing Transcript at 4, Paragraphs 1 and 2

[103] KA-3243, Sentencing Transcript at 15 line 14 to 19

[104] KA-325, GX114 and KA-327, GX114 Table in Focus

[105] KA-447 15 C.F.R. § 14.2(rr): The "working capital advance" is defined at § 14.2(rr) as "a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period." If […] the recipient lacks sufficient working capital , the Grants Officer may authorize payment on a working capital advance basis. Under this procedure, the Grants Officer shall provide for advancing funds to the recipient to cover its estimated disbursement needs for an initial period […].15 C.F.R. § 14.22(f). [KA-484] • Recipients are to be paid in advance […]. Advances of funds to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of advances of funds shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs. 15 C.F.R. § 14.22(b)

[106] Q.E.D. is an initialism of the Latin phrase *quod erat demonstrandum*, which translates as "which was to be demonstrated". The phrase is traditionally placed in its abbreviated form at the end of a mathematical proof or philosophical argument when what was specified in the enunciation — and in the setting-out — has been exactly restated as the conclusion of the demonstration. The abbreviation thus signals the completion of the proof

Conclusion: There was no misappropriated rent; it was *bona fide* payroll

The District Court found the Petitioner guilty of 120,000 of misappropriated funds, of which $60,000 was rent. That rent was reclassified as *bona fide* Salary. The ATP program reclassified the rent as salary, but the court effectively overruled ruled it without recognizing this fact. Also missing was supporting documentation discussed under Brady Violation. That reclassification should have been brought to the Jury. Had the Jury known about this reclassification, along with the Karron contribution, they would not have ruled the Petitioner guilty.

District Court Dismissal of "Dunlevy Evidence"

The Dunlevy forensic reconstruction [107] twelve summary pages or "lead sheets"[108] gives the total cost of the project as $1,524,264[109], of which the Federal Share is $1,345,500[110] and the CASI co-funding contribution was $178,764.[111] The original forensic Analysis of Melvin Spitz, CPA, created for the Department of Commerce Audit Resolution administrative process[112], which was mandated in Department of Commerce Department Administrative Order DAO 213-5 [113] [114] but

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[107] KA-709ff

[108] KA-726ff

[109] KA-747, Dunlevy Forensic Reconstruction at AAC109 Line 18(Lead Sheet 9), BAC-227(KA-885), BAC-310(KA-914), BAC-375(KA-979), BAC-535(KA-1439), CAC-202(KA-1535), CAC-211(KA-1546)

[110] KA-747, Dunlevy Forensic Reconstruction at AAC109 Line 18(Lead Sheet 9), BAC-160, BAC-227, BAC-305, BAC-309, BAC-375, BAC-493, BAC-509, BAC-535, CAC-201, CAC-211,

[111] KA-726, Dunlevy Forensic Reconstruction Lead Sheet at AA-001-C, Dunlevy Contribution figure includes Cash and Non Cash Contributions, such as statutory in-kind [15 C.F.R. §295.32 ((d) The total value of any in-kind contributions used to satisfy a cost sharing requirement may not exceed 30 percent of the non-federal share of the total project costs."] [15 C.F.R. §295.2(l) "Sources of revenue to satisfy the required cost share include cash and in-kind contributions."), See also GX3 at 2 .3(b) ("Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or in kind contributions. However, the Recipient must meet its cost share commitment over the life of the award.") contributions, Account Payables (and paid later)Spitz in the Appendix of GX62 gives a different, lower figure for the CASI cash only contribution out of Karrons' payroll at 79,474.18. This is still different from the Government's contention of zero CASI contribution at GX62 Report ATL 16095-4-0002 at 6.)

[112] A copy of the Spitz report is included inGX62, the OIG Final Audit Report No. ATL-16095-4-0002 APPENDIX III at 14 of 38 (Exhibit at 47 starting from first at cover letter) but never acknowledged at trial, only after trial in Letter to Chambers from Rubinstein October 2,2008 following Rule 33 and 39 Oral Arguments).

[113] Department of Commerce Department Administrative Order 213-5, AUDIT RESOLUTION AND FOLLOW-UP, Effective Date: 1991-06-21 Downloaded Sept 11, 2011 and gives exhaustive administrative civil remedies to resolve audit disputes and appeals to audit disputes.

[114] Department of Commerce Office of Acquisition Management DEPARTMENT OF COMMERCE GRANTS AND COOPERATIVE AGREEMENTS, Version of 02 / 2002 downloaded on Sept 11, 2011 from (Obsolete INTERIM MANUAL,) D. Audit Resolution. 1. In accordance with DAO 213-5, Department and operating unit personnel shall act promptly to resolve both the financial and nonfinancial issues raised in an audit report. Comments, arguments, and evidence (if any) submitted by the auditee and the operating unit shall be considered in resolving these issues. A DOC decision on the resolution of audit findings and recommendations will be made within 180 days of the issuance of an OIG audit report or OIG transmittal letter including findings and

blocked by the OIG Special Agents[115] escalation of this matter into a criminal investigation and prosecution.

The government numbers in evidence (GX112, GX113, GX114) are 'junk', and are unreliable.[116] We can demonstrate this by quick and dirty contradictions between collections of checks and statements and government numbers. For example, GX113 shows no source of funds from Karron; we show an appreciable collection of checks from Karron to CASI that should have been admitted as co-funding at the trial. The true situation with Accounts Payable and Out of Pocket spending is more intricate and we must admit Dunlevy's numbers.

Point 3: Karron Salary, not Government Funds paid for unallocable costs.

Karron's Salary Figures

Karron's year 1 salary was $253,913. [117] Dunlevy shows Karron's tax paid salary for the entire project period of $334,004[118]

Karron's Salary funded contribution and overhead

The total cost of the project is $1,524,264[119], of which the Federal Share was $1,345,500[120] and the CASI contribution was $178,764.[121] This contribution came directly from Karron's after tax Salary. Karron's contribution is not 'double dipping'[122] because it is *bona fide*[123] after tax paid funds. As government grant specialist Snowden testified at trial, you could do "whatever you want with it" [the

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questioned costs reported by an independent accountant in accordance with the procedures and within the specified timeframes identified in DAO 213-5. 4. All disputes arising from audit resolution shall be decided in accordance with the appeal procedures and specified time frames outlined in DAO 213-5, and DOC's "Policies and Procedures for Resolution of Audit-Related Debts," as published in the Federal Register on January 27, 1989 (54 FR 4063).

[115] Trial Transcript at 23 Line 19. RUBINSTEIN: […] This is an e-mail from Rachel Garrison [OIG Special Agent] … cc'd to a number of people,… and it says, "Additionally, please do not proceed with audit resolution for CASI. It's extremely important that a bill not be generated for the funds that CASI misappropriated from the award."

[116] KA-2303ff (at trial it was revealed that the audit was never reconciled back to bank and credit card statements)[Trial Transcript at 473 Line 24 Q. Did you do a bank reconciliation of the various bank accounts of CASI? A "For this audit ?" Q: Right A: No] (Junk Auditing

[117] KA-1626, Decl. of Dunlevy. CAC291, mid-page.

[118] KA-243, Karron Br. at 22 ¶ 2 ¶ 2 A-447,

[119] KA-747 Midpage

[120] KA-885

[121] KA-728, KA-215, KA-251

[122] KA-2899, Trial Tr. at 1066 Line 22 *et seq* (Benedict Cross).

[123] U.S. v. Mills, 140 F.3d 630 (6th Cir., 1998)

after tax salary funds]. [124]

Point 4: Karron Contribution Ignored

The Government impugns that Karron made no contribution to the project by Exhibits GX112 and GX113. That is incorrect; as can be seen by the collection of checks and the forensic reconstruction. Karron's and CASI contribution consisted of personal checks, unreimbursed personal credit card project costs, earned wages and unpaid payroll ("no pay paychecks") with payroll taxes paid, and other CASI accountant and auditor Hayes accounting tricks.

Karron was required to Co-Funds Project Direct Costs, Indirect Costs.

The ATP budget calls out not only for the application of government funds. The ATP budget form[125] and Amendment #3[126] calls out a "Recipient Share of Cost". This is further broken down in the "Estimated Multi-Year Budget" into three categories of cost, specifically Part 1, "OBJECT CLASS CATEGORY" Lines I, Total Direct Costs Requested from ATP; J, Total Direct Costs Shared by Proposer; K, Total Indirect Costs Absorbed by Proposer. These are re-iterated the form at Part 2.; "SOURCES OF FUNDS"; A. ATP (Same as Line I); B. PI (Karron Co-Funding); C. PI Indirect Costs absorbed ; In addition, there are non-project overhead costs paid by CASI and unfunded project mandates such patent lawyer costs[127].

GX112 is Junk

GX112[128] does not give any numbers. It does not give any backup source was used to create the graph. It is junk because it does not include any of the contributions checks from Karron; cf Karron Personal MasterCard [129] Karron Personal Checks [130]. DB Karron cash and personal accounts contribution is $25,735.95 for year 1.[131] The aggregate co-funding by the end of Year 1 was

[124] KA-2211, Trial Tr. at 381 Line 15
[125] KA-637, The original Cooperative Agreement form (NIST-1252) contains an **"**ESTIMATED MULTI-YEAR BUDGET - SINGLE COMPANY".
[126] KA-<<>>, GX23, Amendment #3
[127] KA-433, 15 C.F.R. Subtitle B, Ch. II (1–1–01 Edition) § 295.8 Intellectual property rights;;. (a)((2) *Patent procedures* KA-15
[128] KA-344, GX112 Casi Bank Account Source of Funds Year 1
[129] KA-398, GX-ZZZ and KA-417, GX-ZZZ-1 Schedule
[130] KA-348ff
[131] KA-736, FYE 9/30/02

$85,972.

GX113 is Junk

GX113[132] is does not give any numbers or any way to trace the graph back to any tables or schedules. The impression it gives is that Karron did not make any contribution to the program; that impression is wrong. Year two cash (only) contributions total[133] checks[134] total $63,500 were made from after tax *bona fide* Karron salary.

QUARTERLY SPENDING BY REVISED SF269A

Table 1 Ground Truth Grant Spending for First Year by Quarter cast in SF269A terminology.

SF269A Review						
Corrected Figures		Q1	Q2	Q3	Q4	x sum
a	Total Outlays	$258,320.00	$190,036.00	$214,071.00	$223,545.00	$885,972.00
b	Recipient Share of Outlays	$ 41,682.00	$ 1,365.00	$ 17,053.00	$ 18,104.00	$ 78,204.00
c	Federal Share of Outlays	$210,000.00	$240,000.00	$140,000.00	$210,000.00	$800,000.00
d	Total Unliquidated Obligations	$ 6,638.00	$ (51,329.00)	$ 57,018.00	$ (4,559.00)	$ 7,768.00
	b+c+d	$258,320.00	$190,036.00	$214,071.00	$223,545.00	$885,972.00
	Zero Check(b+c+d-a)	$ -	$ -	$ -	$ -	$ -
	Original Date Signed	1/31/2002	4/21/2002	7/12/2002	10/28/2002	$149,660.00
a	Total Outlays	$219,573.00	$188,203.00	$208,727.00	$212,977.00	$829,480.00
b	Recipient Share of Outlays	$ 9,573.00	$ 8,214.00	$ 8,727.00	$ 2,979.00	$ 29,493.00
c	Federal Share of Outlays	$210,000.00	$180,000.00	$200,000.00	$210,000.00	$800,000.00
	Over Cofunding	$ 48,320.00	$ (49,964.00)	$ 74,071.00	$ 13,545.00	$ 85,972.00

This chart is the Dunlevy's forensic analysis of CASI and ATP project spending by quarter for the first year. The co-funding exceeded the spending except for Q2. The co-funding by the end of Year 1 was $85,972, well in excess of the required year 1 funding requirement called out in the budget of %4.57, or $30,500.

Conclusion: Had the jury been made aware of Karron contributions it would have returned a different verdict.

132 KA-375, GX113 CASI Bank Accounts Source Of Funds Year 2
133 KA-373, Schedule of Karron Co-Funding 2n Year by Check totaling 63,500.00
134 KA-378, KA380, KA-382, KA-384, KA-386, KA-388, KA-390, KA-392, KA-394, KA-397 totaling 63,500.00

Had the Jury known Karron paid for misappropriated costs with *bona fide* personal funds, and not with government funds, there is a significant probability that that they would not have returned a guilty verdict.

Petitioner's Brady Claims

Petitioner Claim of OIG Agent Intimidation

Special Agent Ondrik is no stranger to intimidation claims.

OIG Agent Ondrink has a history of intimidating targets and colleagues of targets in order to pursue investigations.[135]

> […] IG Special Agent Rachel Ondrik appeared unannounced at Mendez's USPTO office door. Mendez invited her in. She closed the door, notified Mendez that she was conducting a formal investigation and that he must truthfully answer her questions. She did not notify Mendez of his rights, including his right to have representation present. Her questioning began with a statement similar to, "You spend a lot of time here, Mr. Mendez." […] She then questioned Mendez's own time recording practices with questions similar to, "Can you certify that your timesheets are correct?" Ondrik also questioned Mendez about his conduct with questions like, "Could you describe any problems or issues of conduct that you had in the past?" This investigative interview lasted approximately 2.5 hours. Ondrik also made a closing statement similar to, "I checked you out, and you're okay," referring to Mendez's time and attendance. This showed that Ondrik also obtained Mendez's 690E timesheets for comparison with the turnstile records. In the second examiner's case, Ondrik called the examiner and demanded that the examiner meet with her that day for an interview. The examiner asked to make an appointment on another day because of prior job commitments. Ondrik then called the examiner's group director, who called the examiner to say that the interview was mandatory. This disrupted the examiner's work schedule and caused embarrassment in front of the group director and supervisor. After setting an interview time, the examiner contacted POPA Vice President Larry Oresky to be present at the interview. With a POPA rep present, Ondrik did not question the examiner about time accounting practices. Ondrik did question the examiner about what had been said to the attorney of the examiner under criminal investigation for time fraud. At the time of their interviews with Ondrik, neither examiner was suspected of wrongdoing. It appears the only reason for singling out these examiners for IG investigation and questioning was that they both were subpoenaed to appear as witnesses for the defense in a criminal case stemming from irregularities between a former employee's timesheets and turnstile records. This looks like blatant intimidation of defense witnesses and misuse of official position by an agent of the U.S. government. It appears that the USPTO clearly cooperated with Ondrik's unwarranted investigation of these two employees by providing turnstile records and 690E timesheets.[136]
>
> Dear Mr. Dudas:

[135] KA-697, KA-700
[136] KA-697, POPA News January-February 2007 Vol. 07 No. 1

> I am a primary examiner who was interrogated by Department of Commerce Inspector General (IG) personnel after being subpoenaed by the defense [in an ongoing criminal prosecution of a former examiner on time fraud charges].
> […] At least, the General Counsel attorneys should ensure constitutional fairness in the IG fact-finding activities instead of justifying their inaction under the false assumption that they cannot interfere with this process. Such inaction will inevitably result in the collection of tainted evidence as the courts recognize the illegalities of these activities.
> Finally, based on my interrogation, this agency and the Commerce Department IG expect perfection concerning timekeeping reporting requirements. Unfortunately, this standard cannot be achieved unless the electronic security system is linked to the "timesheet" software. […]
> To bring criminal actions against employees having time discrepancies without offering counseling, rehabilitation, and/or progressive discipline is simply abusive and will inevitably affect the productivity and retention goals of this office. Very respectfully, Manuel Mendez, Primary Patent Examiner[137]
> In June 2006 IG Special Agent Rachel Ondrik paid a surprise visit to the examiner at home and asked about her time accounting. Ondrik indicated that there were a number of discrepancies between the examiner's badge-in, badge-out turnstile records and the time she reported on her time and attendance forms. Ondrik questioned other USPTO examiners in their offices about this case in ways that they described as witness intimidation.[138] The Commonwealth of Virginia arrested the examiner in July 2006 on charges of obtaining money, and attempting to obtain money, under false pretenses. The trial was held in January 2007. Ondrik testified at the trial that one of the examiner's earlier supervisors "had warned her that those turnstile records could be audited and her time sheets should match them." The examiner testified that she had never been so warned. Interestingly, USPTO Director of Security and Safety J. R. Garland testified at the trial that the turnstile design was not intended for time keeping purposes. [139]

Compare this with Goldbergs' declaration[140] dismissed by this Court because Goldberg did in fact testify at the trial. Goldberg not only testified but was sufficiently enraged by the Special Agents behavior to donate almost 16,000 of his own funds, on top of the funds he invested (and lost) in CASI.

2. Petitioner's Claim of Exculpatory Documents

Riley must have created contemporaneous field notes, e-mails and work papers from her two visits to CASI. The decision to reclassify rent into payroll must have more supporting backup; an auditor would never make a decision like that on her own. It must have been an ATP management decision that was suppressed.

1. Procedural Default

[137] KA-700, POPA News, POPA News January-February 2007 Vol. 07 No. 1 at 3An Open Letter to Director Dudas
[138] KA-700, POPA News, Jan. 2007, above [citation as in original]
[139] KA-700, POPA News April-May 2007 Vol. 07 No. 2 at 8-9 (Patent Office Professional Association, the Patent Examiner Union in the Department of Commerce)
[140] KA-288 Exhibit G DECLARATION OF LEE H GOLDBERG, cf KA-20

The "Procedural Default" Doctrine

If a section 2255 movant could have raised a claim at trial or on direct appeal but did not, § 2255 relief on that claim may be barred by the "Procedural Default" Doctrine[141]. A " § 2255 petition may not be used as a substitute for direct appeal".[142] A claim is "procedurally defaulted" if it is the type of claim that "can be fully and completely addressed on direct review based on the record created" in the trial court, but was not raised on direct appeal.[143] "In order to raise a claim that could have been raised on direct appeal, a § 2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error."[144] "[F]ailure to raise a claim on direct appeal is itself a default of normal appellate procedure, which a defendant can overcome only by showing cause and prejudice."[145] These claims are waived unless the petitioner can show actual innocence or show cause excusing the procedural default, and then actual prejudice resulting from the error[146] Finally, demonstrating "fundamental miscarriage of justice" can overcome all.[147]. An issue that was raised and decided on direct appeal bars defendant from raising it again in a § 2255 motion, absent extraordinary circumstances, such as an intervening change in the law or newly discovered evidence.[148]

These hurdles are intentionally high ones to surmount, as the Supreme Court has concluded that respect for the finality of judgments demands that "a collateral challenge may not do service for an appeal," except in exceptional circumstances[149]

Procedural default doctrine does not apply to Brady claims

The procedural default doctrine applies only to claims that <u>could</u> have been raised at trial or on direct appeal. **It does not apply to claims cannot be raised in a direct appeal and that require development of facts outside the trial record[150]**. The procedural default doctrine never bars a claim of ineffective

[141] United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594, 71 L.Ed.2d 816 (1982)
[142] Marone v. United States, 10 F.3d 65, 67 (2d Cir.1993) (citing United States v. Frady, 456 U.S. 152, 165 (1982).
[143] Bousley v. U. S., 523 U.S. 614, 622, 118 S. Ct. 1604, 1611, 140 L.Ed.2d 828 (1998)
[144] Yick Man Mui v. United States, 614 F.3d 50, 54 (2d Cir. 2010);
[145] Campino v. United States, 968 F.2d 187, 190 (2d Cir.1992)
[146] United States v. Frady, 456 U.S 102 S. Ct. 1584, 1594, 71 L.Ed.2d 816 (1982) at 152, 168.
[147] Murray v. Carrier, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)
[148] Davis v. United States, 417 U.S. 333 (1974)
[149] United States v. Frady, 456 U.S. 102 S. Ct. (1982) at 1593-94 at 165, 167-68
[150] Bousley v. U.S., 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)

assistance of counsel raised in a § 2255 proceeding, even if that claim could have been, but was not, raised on direct appeal[151].

Ineffective Assistance of Counsel

Ineffective Assistance of Counsel Standard

Deficient Performance

Solid forensic accounting should have trumped junk accounting and would have won the case for the Petitioner. The Government's junk auditing should have been challenged by Counsel. That it was not challenged was Deficient Performance. As a result, the Defendant was denied Effective Assistance of Counsel

GX114, the lynchpin of the Petitioners' conviction is innumerate[152] and is partially made up to suit the Prosecution. The jury relied on this piece of evidence.[153] The Jury was charged to weigh circumstantial and direct evidence equally.[154] The Jury was never given any opposing exhibit to GX114; GX114 should not have been admitted into evidence. The defense counsel did not challenge GX114 math errors with any opposing forensic direct evidence. Counsel failed to discover any significantly new exculpatory material evidence, such as shown in Point 3 (co-funding checks) instead recycled Prosecutions exhibits.[155]

Prejudice to Petitioner

The prejudice that the unchallenged GX112, GX113, GX114 and GX115 caused is clear and patently damming: The Prosecution continued to harp on GX114 all through the trial[156] and it penetrated into the Jury deliberations as a Jury Callback exhibit[157]. It was not until Sentencing that the Trial Judge *sui sponte*

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[151] Massaro v. United States, 538 U.S. 500, 503-04, 123 S. Ct. 1690, 1693, 155 L.Ed.2d 714 (2003)
[152]The numerical inconsistencies in GX114 are of a crude nature that would not be made by a person experienced in accounting and numerate reporting.
[153] Trial Transcript at 1379 Line 24 (Jury callback during deliberation)
[154] Jury Charge Case 1:07-cr-00541-RPP Document 56-7 Filed 07/21/2008 at 7
[155] R. Br. at 10, ("B. The Defense Case".)
[156] Trial Transcript at 762 Line 17; Trial Transcript at 764 Line 22; Trial Transcript at 795 Line 25; Trial Transcript at 796 Line 2; Trial Transcript at 803 Line 6, 14; Trial Transcript at 804, Trial Transcript at Line 17, Line 25; Trial Transcript at 805, Line 8, Line 12; Trial Transcript at 814 Line 15, Line 22; Trial Transcript at 820 Line 506; Trial Transcript at 822 Line 6-7, 18-19; Trial Transcript at 828 Line 15-21; KA-2661, Trial Transcript at 829 Line 2-20; KA-2662, Trial Transcript at 830 Line 5; KA-3101, Trial Transcript at 1266 Line 16; KA-1269, Trial Transcript at 1269 Line 10; KA-3105, Trial Transcript at 1270 Line 6
[157] KA-3205, Trial Transcript at 1370 Line 24, Jury Callback Exhibit List.

observed GX114 was unsupported by GX110. The Judge Patterson hewed to this fact despite the prosecutors tried to talk the Judge out of it with an "snow job".[158] The same "snow job" used on the Jury. The numbers do not make sense.[159] There was a reasonable probability given it was the Judges' own astute observation that Counsel would have prevailed on a suppression motion.

Counsel's Preparation for Trial

Long Story to be made short. Counsel should have prepared for the trial and realized the ATP had exceeded its authority as argued in Point 1.

Counsel Failed to Impeach the Governments "Key Witness"

Riley should have been impeached as an expert witness by Rubinstein. She would have shattered on the stand if she admitted she was coerced and intimidated into taking Ondrik's made up numbers into evidence and onto the stand. She was a weak witness because she knew she was bearing false witness. She is impeached to this day because her exhibits are innumerate and not suitable for a criminal trial; they convicted an innocent person.

Counsel Failed to Utilize Forensic Accounting Analysis

Had Spitz and Dunlevy been used to impeach Riley at trial and show the Jury the three points (above) of actual innocence, it is quite reasonable that the Jury would have returned an innocent verdict.

Conclusion

The District Courts' refusal to issue a Certificate of Appealability must be overruled and this court should issue its own Certificate of Appealability based on valid and appealable Issues of Fact, Law, and Constitutional Issues. Had these facts issues been raised at the Criminal Trial, the verdict at the criminal trial would have been one of Innocent, instead of Guilty.

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[158] KA-3234, Sentencing Transcript at 6 Line 3 ("[COURT] Show me. She has no tabulation putting [Exhibit] 114 into context with her […] Exhibit 110. [KWOK]: If your Honor could look at Government Exhibit 110. […] [COURT] I did look at Exhibit 110.[…] I'm fully familiar with it. […] That's loan and loan repay. That's not salary […] I understand. It's just not salary. [KWOK] If I can just correct a misimpression, Government Exhibit 114[GX114] is not a rough calculation. It's not a guess. It's based entirely on Government Exhibit 110 which, In turn, is based entirely on the bank records that she reviewed**. [COURT] They are certainly not in those records,** […]")[emphasis added]

[159] Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). at 595; United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve.").

Signature

D. B. Karron, *pro se*

Dated: August 1, 2012 in Long Beach, New York

Appendix

CERTIFICATE OF COMPLIANCE

United States Court of Appeals

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(ii)

(7) Length.

(A) Page limitation.

A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

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(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
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(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

As measured by the word processing system used to prepare this brief, there are no more than 30 pages or at most 14,000 words.

There are <<10,858,000>> words in this brief, exclusive of table of contents, table of citations, and certifications of do not count toward the limitation.

D. B. Karron
pro se
August 1, 2012
Long Beach, New York

Certificate of Service

United States Court of Appeals

Daniel B. Karron,
Petitioner - Appellant

v.

United States of America,
Respondent - Appellee.

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12-2297pr

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